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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 39171-6-II)

LEO MACIAS and PATRICIA MACIAS,
Plaintiffs-Petitioners,

v.

SABERHAGEN HOLDINGS, INC., et al.,
Defendants-Respondents.

FILED
APR 29 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPPLEMENTAL BRIEF OF DEFENDANTS-RESPONDENTS RESPIRATOR MANUFACTURERS

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I. INTRODUCTION

The Respirator Manufacturers submit this supplemental brief in further support of their primary briefs submitted to the Court of Appeals in this matter.

This case presents the same issue that this Court decided in *Simonetta* and *Braaten*:[1] Does a manufacturer of a product that does not contain asbestos have a duty to warn about the dangers of asbestos released from another company's product? This Court answered this question in two well-reasoned cases that thoroughly examined the law both of Washington and of other jurisdictions. The Court concluded that a manufacturer does not have a duty to warn of the dangers of another's product, even when the purpose of the product at issue necessitates interaction with the hazardous product. Numerous jurisdictions around the country apply the same reasoning. The Court should adhere to its earlier analysis and affirm the well-reasoned opinion of the Court of Appeals.

In his petition for review to this Court, Macias argues for the first time that the respirators somehow combined with asbestos to create a new hazard that justifies an exception to the rule. This new argument was not presented to the Court of Appeals. In fact, Macias expressly stated to the trial court that this was not a "combination" case. Because Macias has asserted this argument for the first time to this Court, that argument should be rejected. Even if the Court considers this argument on the merits, it

[1] *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008); *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008).

should reject it. The combination exception applies only where two sound products combine to create a new hazard. That exception does not apply here. Macias does not contend that asbestos is a sound product. Instead, the risks allegedly created by the combination of the respirators and asbestos are the same risks allegedly created by asbestos itself.

Macias also urges this Court to create an entirely new exception and hold that manufacturers of "safety products" have a duty to warn about the dangers of other manufacturer's products. Thus, Macias argues that manufacturers of safety products must satisfy a higher standard of care than do the manufacturers of other products. This is merely another version of the argument that manufacturers have a duty to warn of dangers that they anticipate users will encounter when using their products—that is, that they have a duty to warn based on the foreseeability of risks. But this Court has firmly rejected the proposition that the foreseeability of a risk creates a duty. In addition, adopting such an exception would run contrary to the many policy considerations that favor imposing the burden to warn on those in the best position to do so—that is, the manufacturers of products that are in themselves hazardous. Moreover, the proposed exception would be inapplicable here, as Macias was not using the respirators for their safety purpose. He was cleaning them, not wearing them. Under the facts of this case, the respirators were exactly like the products at issue in *Simonetta* and *Braaten.*

Even if the Court created such an exception, it should not be applied retroactively to the Respirator Manufacturers, who manufactured and sold their products more than 30 years ago.

The Respirator Manufacturers therefore request that the Court affirm the Court of Appeals' decision and dismiss Macias's claims.

II. ARGUMENT

A. This Case Falls Squarely Within the Holdings of *Simonetta* and *Braaten*

1. *A Party Outside the Chain of Distribution of a Hazardous Product Has No Duty to Warn of the Hazards of Another Party's Product*

In *Simonetta* and *Braaten*, this Court ruled that a manufacturer of a product does not have a duty to warn of the dangers of asbestos contained in a product that it did not manufacture, supply, or sell, even if use and maintenance of the non-asbestos-containing product would require exposure to asbestos. *Simonetta*, 165 Wn.2d at 361; *Braaten*, 165 Wn.2d at 385. Macias's allegations must be dismissed under this rule. Macias argues that the Respirator Manufacturers had a duty to warn him of the dangers of asbestos, which he allegedly encountered while cleaning the respirators, because the Respirator Manufacturers should have known that persons would encounter asbestos while performing required maintenance.

In his concurrence to the Court of Appeals decision, Judge Penoyer states that he considers the respirators to be different from the products in *Simonetta* and *Braaten* because "the respirators' intended purpose was to capture hazardous substances and thus protect the user. For the respirators

to function properly, as intended by the user and the manufacturer, the user or a co-worker needed to clean the respirators' surfaces and the filters containing concentrated hazardous products." *Macias v. Mine Safety Appliances Co.*, 158 Wn. App. 931, 952, 244 P.3d 978 (2010) (concurrence). On that basis, he asks whether the Supreme Court might "choose in the future to paint with a narrower brush in cases such as this."

As discussed below, there is no evidence in the record that asbestos allegedly "captured" by the respirators in performing their safety function caused Macias any harm. In addition, Judge Penoyer overlooks the fact that this Court previously rejected precisely the same argument made by the same counsel in *Simonetta* and *Braaten.* In those cases the plaintiffs, just like Macias, argued that liability should be imposed on manufacturers of non-asbestos-containing products based on the fact that those products were intended to be used with asbestos-containing materials that would have to be disturbed during necessary and intended maintenance. *Simonetta* and *Braaten* cannot be painted more narrowly without rejecting the very principles that led the Court to issue those opinions in the first place.

2. *Courts Throughout the Country Have Adopted the Same Reasoning That This Court Did in Simonetta and Braaten*

This Court recognized that its reasoning in *Simonetta* and *Braaten* "is in accord with the majority rule nationwide." *Braaten*, 165 Wn.2d at 385. Numerous other jurisdictions have performed the same analysis and come to the same conclusion as this Court did in *Simonetta* and *Braaten.*

Indeed, many courts have cited these opinions when holding that manufacturers of non-asbestos-containing products do not have a duty to warn about asbestos, even if harm from another manufacturer's asbestos-containing product is foreseeable.

In *Taylor v. Elliott Turbomachinery Co., Inc.*, 171 Cal. App. 4th 564, 591–92, 90 Cal. Rptr. 3d 414, *reh'g denied* (Mar 27, 2009), *review denied* (Jun 10, 2009), the California Court of Appeals held that a product manufacturer had no duty to warn of the dangers inherent in asbestos products supplied by other manufacturers. The facts in *Taylor* are analogous to those in *Braaten*. After an exhaustive review of California product liability law, the court affirmed the entry of summary judgment, holding that the duty to warn is restricted to entities in the chain of distribution of the defective product. *Id.* at 575. Like this Court, the *Taylor* court concluded that the defendant manufacturers had no duty to warn because "the agent that caused Mr. Taylor's injury did not come from respondents' equipment itself, but instead was released from products made or supplied by other manufacturers and used in conjunction with respondents' equipment." *Id.* at 579–80. Even if intended use of the product makes the risk of harm from another manufacturer's product foreseeable, the California courts, like this Court, restrict a manufacturer's duty to warn to the dangers posed by its own products. *Id.*

The U.S. Court of Appeals for the Sixth Circuit Court recently issued an opinion that adhered to this Court's reasoning in *Simonetta* and *Braaten*. *Dreyer v. Exel Indus., S.A.*, 326 Fed. Appx. 353, 2009 WL

1184846 (6th Cir. 2009) (applying Michigan law). In *Dreyer,* the Sixth Circuit concluded that a manufacturer has a duty to warn only of dangers presented by the manufacturer's own product, even if it is foreseeable that the manufacturer's product will be used in combination with another product. *Id.* at 357 n.2.

The *Dreyer* court based its decision in part on *Brown v. Drake-Willock International, Ltd.*, 530 N.W.2d 510, 515 (Mich. App. 1995). In *Brown,* the Michigan Court of Appeals rejected a dialysis technician's failure to warn claim against the manufacturer of the dialysis machine based on the technician's injuries from exposure to formaldehyde used to clean the machine. Even though the manufacturer "*recommended*" that formaldehyde be used to clean its machines and "*anticipated*" that it would be used in connection with its own product, the court concluded that the manufacturer had no duty to warn of hazards of products manufactured by another. 530 N.W.2d at 514–15 (emphasis added). The technician, like Macias, did not allege that the defendant's product itself caused the injury. *Id.* at 515.[2]

[2]*See also In re Asbestos Litig. Limited to Olson*, 2011 WL 322674, at * 2 (Del. Super. Ct. Jan. 18, 2011) (interpreting Idaho law and citing *Braaten;* "the majority of courts to address the issue have refused to impose liability upon manufacturers of nonasbestos-containing products for the dangers associated with asbestos-containing components or replacement parts manufactured, sold, and distributed by other entities."); *In re Asbestos Litig. Limited to Taska*, 2011 WL 379327, at *1 (Del. Super. Ct. Jan. 19, 2011) (interpreting Connecticut law as requiring "evidence that the plaintiff inhaled dust from the defendant's product" and citing *Braaten* as persuasive authority on the issue) (internal quotations omitted; emphasis in original); *Rumery v. Garlock Sealing Techs., Inc.*, 2009 WL 1747857 (Me. Super. Ct. April 24, 2009) (agreeing with the reasoning in *Simonetta* and *Braaten* and holding that, even though addition of asbestos to defendant manufacturer's product was foreseeable, defendant had no duty to warn).

B. This Case Does Not Warrant an Exception

1. *The Combination Exception Does Not Apply*

Macias's petition for review focuses almost exclusively on a new argument that the respirators "captured and concentrated" asbestos, thereby combining to create a new hazard. This argument fails for several reasons.

First, Macias actually argued the opposite to the trial court. There, he argued that "[i]n *Simonetta/Braaten*, the plaintiffs' claims were necessarily dependent on a combination of the party-defendants' products with asbestos manufactured by other, non-party manufacturers . . . . Conversely, in the present case, Plaintiff's warning claims focus strictly on the defective design characteristics of the product itself."[3] CP 295–96. Given that Macias took a contrary position and failed to raise this "combination argument" at the Court of Appeals, both the principle of judicial estoppel and RAP 2.5(a) bar him from offering this new argument to the Court.

Judicial estoppel prevents a party from taking one position in a court proceeding and then later seeking an advantage by taking a clearly inconsistent position. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008).[4] RAP 2.5(a) precludes a party from raising an argument not

[3]As discussed more fully below, Macias actually asserted a failure to warn claim, which this Court distinguishes from a product defect claim. Nonetheless, it is clear that he never made the "combination" argument to the lower courts.

[4]In analyzing whether judicial estoppel applies, courts consider the following factors: (1) whether the two positions are clearly inconsistent; (2) whether judicial acceptance of an inconsistent position in a later proceeding would cause a perception that the first court was misled; and (3) whether the party asserting the inconsistent position would derive an

asserted below. RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("Failure to raise an issue before the trial court generally precludes a party from raising it on appeal."); *see also State v. Scott*, 48 Wn. App. 561, 568, 739 P.2d 742 (1987). The Court should not entertain this newly raised argument.

Second, the "combination" exception applies only where two sound products interact to create a new hazard. Macias does not allege that asbestos itself is a "sound" product. To the contrary, he claims that asbestos is an unsafe product. This Court specifically recognized the importance of this distinction in *Braaten*. The Court cited *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992), a case in which the New York Court of Appeal discussed and analyzed the distinction. As in *Rastelli*, in this case the Respirator Manufacturers, as the manufacturers of the "sound" products (the respirators), had no control over the production of the "unsound" product (asbestos), did not place the unsound product in the stream of commerce, and did not derive any benefit from the sale of the unsound product. *Id.* at 226. In light of those considerations, this Court should conclude that the manufacturer of the sound product had no duty to warn about the dangers associated with that unsound product. *See id.*

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unfair advantage. *Id.* Here, all of the elements are met. The clear statements of Macias at the trial court and in the petition for review are completely opposite. Macias used this argument to attempt to distinguish *Simonetta* and *Braaten* to the trial court, which was apparently successful. Now the plaintiff seeks to gain an unfair advantage by taking the contrary position.

Third, there is no evidence that the respirators "captured" and "concentrated" the asbestos as Macias now alleges. In the trial court and the Court of Appeals, Macias argued that he was exposed to asbestos when the respirators would return to the tool room covered with asbestos that he claims would fall off when the respirators were tossed into a bin. CP 292–93. He did not argue that he cut open or manipulated the filters or that any of the dust collected inside the filters was released. Further, there is no evidence that the respirators "captured" or "concentrated" asbestos in a way that differed from the way that any other piece of equipment or tool found throughout the shipyard "captured" or "concentrated" the asbestos that fell on their surfaces. Nor is there any evidence suggesting that the respirators released asbestos at any more dangerous rate than did any other non-asbestos-containing product in the shipyard.

In short, Macias was exposed to a hazard created solely by asbestos. The "combination exception" does not apply.

2. *The Court Should Not Create an Exception Based on the Alleged Safety Purpose of a Product*

a. *The Fact That a Product Has a "Safety Purpose" Has No Bearing on the Duty Analysis*

Macias urges the Court to create a "safety purpose" exception to the rule announced in *Simonetta* and *Braaten* and hold that the Respirator Manufacturers may be held liable for failing to warn of the dangers of another's product. Macias does not cite, and the Respirator Manufacturers cannot find, any authority to support the creation of such a heightened

standard.[5] Indeed, in *Simonetta* and *Braaten* this Court considered whether the "purpose," "intent," "knowledge," or "expectation" regarding the use of the product could create a duty to warn, and it determined that these factors merely meant that exposure was foreseeable. This Court concluded that it makes "no difference whether the manufacturer knew" its products would be used in conjunction with a product containing asbestos. *Braaten*, 165 Wn.2d at 385; *Simonetta*, 165 Wn.2d at 361. Because "[f]oreseeability does not create a duty, but sets limits once a duty is established," a duty to warn cannot be imposed based on the purpose or intended use of a product. *Simonetta*, 165 Wn.2d at 349 n.4.

b. *Sound Policy Principles Counsel Against Creating Such an Exception*

Imposing a duty to warn based on a product's status as a "safety product" invites the danger of obscuring and grossly inflating responsibility for product warnings, thereby creating a duty that manufacturers could not realistically satisfy. Macias proposes no way even to define what the term "safety product" means. The term "safety product" can include anything from clothing to fire extinguishers, from ventilation equipment to first aid kits, and many, many other products. Is the maker of ventilation systems required to warn about all of the potential air contaminants that might exist in any given environment in which a ventilation system might be installed? Is a manufacturer of first aid

[5]Courts may assume that, where no authority is cited, counsel has searched for and found none. *State v. Young*, 89 Wn.2d 613, 625, 574 P.2d 1171 (1978) (citing *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)).

products required to warn about all of the potential risks that one might encounter when determining whether to apply a bandage? Must a manufacturer of bandages warn about the risk of infection from MRSA (Methicillin-resistant Staphylococcus aureus)? No court has ever imposed such a broad duty.

Moreover, because Macias fails to define the universe of "safety products," that heightened standard of care could be imposed on any manufacturer that incorporates a safety component into its product. Consider a power saw that incorporates safety devices intended to prevent injury. A power saw includes certain functional features (e.g., a motor, a blade, and a handle), but it also incorporates a host of safety features (e.g., multiple kinds of blade guarding, electrical insulation on wiring and switches, and protection from the rotating elements of the saw's electrical motor). Given the presence of safety features on such a product, does Macias's heightened standard apply to all injuries involving such a product? Does it apply only to cases involving a safety component of such a product? If a manufacturer of a finished product obtains a "safety product" from a separate component supplier, is the primary manufacturer held to one standard while the component manufacturer is held to another? These are just a few examples of the quagmire that would be created should the Court adopt Macias's argument.

The Respirator Manufacturers should not be charged with becoming experts not only in their own products but in thousands of other products. Safety products may protect against hazards posed by a wide

range of other products that are too numerous to warn against. For example, respirators have various filters designed to protect wearers against numerous contaminants, including welding fumes, paint fumes, and dust. The Respirator Manufacturers have no control over where their respirators are used or the contaminants that might be in any particular area. They cannot warn against any and every substance that might generate fumes or dust. Indeed, imposing such a broad duty on manufacturers or other sellers of safety products would discourage the manufacture and sale of such products. The current product liability regime imposes liability on manufacturers of safety products for defects in the products themselves—the same rule that applies to manufacturers of other products. The Court should decline to adopt a rule that would discourage the manufacture and sale of safety products.

For these reasons and others, this Court correctly held that the "law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products." *Braaten*, 165 Wn.2d at 385 (citations omitted). Such a rule would impose impossible obligations on the makers of otherwise faultless products. Using the example of rubber gloves (admittedly a "safety product" that can be used with a variety of hazardous substances), the Court of Appeals noted that Macias's proposed rule would impose on glove manufacturers "a duty to warn [that] could well be impossible to fulfill." *Macias*, 158 Wn. App. at 950. As a matter of public policy, the Court should decline to impose a duty that parties cannot meet.

c. *Imposing on Manufacturers a Duty to Warn of Dangers in Other Products Conflicts with the Doctrine of Open and Obvious Dangers*

The Court should also decline to impose a higher duty to warn on manufacturers of safety products because doing so would conflict with long-standing precedent holding that a product seller has no duty to warn of open and obvious dangers.

Manufacturers have a duty to warn only when they have "no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition." RESTATEMENT (SECOND) OF TORTS § 388(b); *see also id.* comment k and § 402A comment j. In keeping with this general principle, under Washington law a product seller has no duty to warn of open and obvious dangers. *See, e.g., Baughn v. Honda Motor Co.*, 107 Wn.2d 127, 139, 727 P.2d 655 (1986) ("It is established law that a warning need not be given at all in instances where a danger is obvious or known."); *Cantu v. John Deere Co.*, 24 Wn. App. 701, 707–08, 603 P.2d 839 (1979) (manufacturer had no duty to warn of risk posed by unguarded spinning power take-off shaft on a tractor).[6]

In adopting the doctrine of open and obvious dangers, the courts have recognized that a product seller has no duty to provide information that the user already has or should have. By their very nature, safety products warn the user that he or she may be exposed to some hazard. For

[6] *See also Mele v. Turner*, 106 Wn.2d 73, 80, 720 P.2d 787 (1986) (premises liability case; lawnmower supplier had no duty to warn user of obvious danger posed by spinning mower blade); *Haysom v. Coleman Lantern Co., Inc.*, 89 Wn.2d 474, 479, 573 P.2d 785 (1978) ("It is . . . well-recognized that a warning need not be given at all in instances where a danger is obvious or known.").

example, the simple fact of using a respirator will tell any reasonable user that he or she is in the presence of some dangerous substance that could otherwise be inhaled and cause injury. Otherwise, the user would not be wearing the respirator.

This was true with Macias. Macias repeatedly argues that the respirators were "designed and intended to be used as protection against hazardous substances such as asbestos." CP 299; *see also* Petition for Review at 2. Macias himself was well aware of the dangers associated with the respirators' use. Indeed, he testified that shipyard workers wore the respirators "to protect themselves from hazardous substances" and understood "throughout his career at Todd Shipyards that there were dangerous substances being generated as part of the work activity on board ships there." CP 136. Given these facts, a reasonable user would have understood that the respirators were being used in the presence of dangerous substances.

Because users of safety equipment such as respirators know or should know that these products are or may be used to protect against dangers posed by other products or substances, manufacturers of those safety products should not have a duty to warn of those dangers. At a minimum, they should not have a higher or additional duty to warn beyond that required of manufacturers of other products.

d. *The Current Principles for Imposing Liability on Dangerous Products Provide Sufficient Protection*

This Court has appropriately concluded that liability for an injury-causing product should be imposed only on the party *in the chain of distribution of that product.* The party who "manufactures, sells, or markets a product [ ] is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained." *Simonetta*, 165 Wn.2d at 355; *Braaten*, 165 Wn.2d at 392.

Other courts have reached the same conclusion. In *Taylor,* the California Court of Appeals noted that a nexus of liability is present if three conditions are met:

> (1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.

171 Cal. App. 4th at 577 (internal citations omitted). None of these three factors is met in the present case: the Respirator Manufacturers received no benefit from the sale of asbestos, had no role in bringing asbestos to the market, and had no control or influence over manufacturing or distributing asbestos. Consequently, no liability should be imposed on the Respirator Manufacturers because of the dangers posed by a different product.

The *Taylor* court further noted that "[o]ther manufacturers cannot be expected to determine the relative dangers of various products they do not produce or sell and certainly do not have a chance to inspect or

evaluate. This legal distinction acknowledges that over-extending the level of responsibility could potentially lead to commercial as well as legal nightmares in product distribution." 171 Cal. App. 4th at 577.

Existing product liability law imposes sufficient legal duties on manufacturers of safety products. They have a duty to design and construct reasonably safe products. Under certain circumstances, a manufacturer of a safety product may have a duty to warn of unknown or non-obvious defects in the design or construction of its own product. But Macias has not identified a construction or design defect.[7] Nothing about the respirators themselves makes them dangerous. They are dangerous solely to the extent that asbestos manufactured by another party falls on them and is then later released from them. Consequently, Macias's

[7] Macias has not asserted a cognizable claim of design or manufacturing defect. (A failure to warn claim is not a design defect claim. *Simonetta*, 165 Wn.2d at 356.) In response to interrogatories, Macias did not identify or describe any claims for design or construction defects and never designated any experts or other witnesses on this subject. CP 272. In a motion for summary judgment, the defendants moved to dismiss all of Macias's claims. Most of the motion was directed toward Macias's duty to warn claims, which were thought to be the only claims in the case. But the motion also asserted that there was no evidence to support the other vague, unsupported boilerplate claims, including those for design and construction defects. In response, Macias argued only the duty to warn claim and presented no evidence or argument to support other claims. CP 289–313. And in response to defendants' petition for discretionary review at the Court of Appeals, Macias again asserted only warning claims. During oral argument, Commissioner Schmidt asked plaintiff's counsel if the issue presented for appeal, the duty to warn, would dispose of the entire case (a factor relevant to discretionary review). Macias's counsel conceded this point. *See* Ruling Granting Discretionary Review at 13. Nowhere in the briefs submitted to the Court of Appeals did Macias identify claims for design or construction defects. Even in his briefing to this Court, he has not identified any actual defect in the products' design.

claims rest solely on his allegation that the Respirator Defendants had a duty to warn of danger caused by another product. This Court has rejected the imposition of such a duty, and it should adhere to its previous well-reasoned opinions on this issue.

e. *This Case Does Not Fit Within the Proposed Exception*

Even if the Court were inclined to adopt a "safety purpose" exception, such an exception would not apply to this case: Macias's claims are *not based on his using the Respirator Manufacturers' equipment to protect him from asbestos.* The purpose of a respirator is to provide protection *while the user is wearing the respirator.* It is physically impossible for a respirator to protect someone, like Macias, who is not wearing that respirator. Because Macias did not use the respirators to protect him from asbestos, the respirators' safety purpose is irrelevant, and the hypothetical "safety" exception would not apply.

C. Any New Exception Should Not Be Applied Retroactively

If the Court creates an entirely new exception to the well-established principle that only those in the chain of distribution have a duty to warn about their product, justice demands that the Court apply this rule only on a prospective basis.

The rule in Washington is that where changes in law cannot be made without undue hardship, courts have discretion to apply a new rule of law purely prospectively—to all litigants whose claims arise after the decision. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278,

208 P.3d 1092 (2009). "If rights have vested under a faulty rule, or . . . subsequent events demonstrate a ruling to be in error, prospective overruling becomes a logical and integral part of stare decisis by enabling the courts to right a wrong without doing more injustice than is sought to be corrected." *State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 666, 384 P.2d 833 (1963).

In *Lunsford*, this Court indicated that it would examine the three factors articulated in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106–07 (1971) in deciding whether to apply a new rule of law prospectively. Under *Chevron*, a court must undertake the following analysis:

1. It must determine whether the decision to be applied prospectively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
2. It must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retroactive operation will further or retard its operation; and
3. It must weigh the inequity imposed by retroactive application.

Id.; see also In re Audett, 158 Wn.2d 712, 720–21, 147 P.3d 982 (2006).

Consideration of these factors indicates that the Court should not retroactively impose on a manufacturer of a non-asbestos-containing product a duty to warn about asbestos. After a thorough examination of Washington case law and the law of other jurisdictions, this Court found "little to no support under our case law for extending the duty to warn to

another manufacturer's product." *Simonetta*, 165 Wn.2d at 353. As the Court of Appeals recognized, "Macias asks us to adopt a rule which no other court has adopted." *Macias*, 158 Wn. App. at 950. If this Court departs from well-established precedent and adopts this novel rule, then the Court should apply that rule only prospectively.

Retroactive application also would not promote the purpose in creating an exception to *Simonetta* and *Braaten*. Should the Court hold that manufacturers of safety products have a duty to warn about the dangers of other products, it would presumably impose that duty to encourage manufacturers of safety products to change their conduct and provide additional warnings. In other words, the rule would be aimed at changing the future conduct of manufacturers. Retroactive application of the rule would not serve that policy purpose: manufacturers cannot change their past behavior or the warnings and instructions previously provided.

Similarly, the purpose of applying a new strict liability rule would not be furthered by applying the exception retroactively. The purpose of strict liability is to impose on manufacturers and other product sellers the cost of compensating parties harmed by hazardous products. Imposing strict liability on manufacturers is justified because they can spread the costs by including that risk in the price of the product. *See* RESTATEMENT (SECOND) OF TORTS § 402(A), cmt. c (1965); Alfred W. Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact of U.S. Product Liability Laws*, 9 J.L. & COM. 167, 174–75 (1989). Under prior precedent, manufacturers who are not in the chain of distribution could not foresee

that strict liability would be imposed on them for dangers posed by other products. Consequently, the Respirator Manufacturers have had no reason to spread the cost of a hitherto unknown liability risk among its customers.

Finally, because manufacturers have never had a duty to warn about the hazards of another's product, the Respirator Manufacturers could not be expected to have anticipated liability for such a failure to warn. Thus, retroactive application would be unjust.

III. CONCLUSION

The Respirator Manufacturers respectfully request that this Court affirm the well-reasoned decision of the Court of Appeals and affirm the dismissal of Macias's claims.

DATED this 29th day of April, 2011.

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PROOF OF SERVICE

I certify that I am a secretary at the law firm of Riddell Williams P.S. in Seattle, Washington. I am a U.S. citizen over the age of eighteen and not a party to the within action. On the date shown below, a true and correct copy of the foregoing was served on counsel of record for Plaintiffs/Petitioners and Defendant Saberhagen Holdings, Inc. as indicated below:

Matthew P. Bergman Brian F. Ladenburg BERGMAN, DRAPER & FROCKT 614 First Avenue, Fourth Floor Seattle, WA 98104 matt@bergmanlegal.com brian@bergmanlegal.com John W. Phillips Matthew Geyman PHILLIPS LAW GROUP 315 Fifth Avenue South, Suite 1000 Seattle, WA 98104 jphillips@jphillipslaw.com mgeyman@jphillipslaw.com *Attorneys for Petitioners*	☑ Hand Delivery ☑ E-mail ☐ U.S. Mail ☐ Facsimile
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 29th day of April, 2011 at Seattle, Washington.

Lisa R. Werner

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Macias v. Saberhagen Holdings, Inc., et al.
Washington State Supreme Court, Case No. 85535-8
Daniel Gunter, (206) 624-3600, WSBA #27491, dgunter@riddellwilliams.com

Attached is the Defendants/Respondents Respirator Manufacturers' supplemental brief for filing with the Court. Thank you.

LISA WERNER | RIDDELL WILLIAMS P.S.
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